

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 85 of 2016

STATE

V

ISIMELI MOCEVAKACA

Counsel : Ms. Moumita Chowdhury for the State
Ms. Talei Kean for the Accused

Dates of Trial : 1-3 April 2019

Summing Up : 4 April 2019

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "LS".

SUMMING UP

Madam Assessor and Gentlemen Assessors,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box and the admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both Defence Counsel and State Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11] As I already indicated to you, a matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has his or her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] According to the evidence you heard in this case, the complainant, LS, was 16 years old at the time of the alleged incidents, and was 19 years old when she testified in Court (She said her date of birth was 12 April 1999). Experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

- [16] Furthermore, the experience of the Courts is that victims of sexual offences react to the incident in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, may not complain or go to the authorities for some time. There is, in other words, no classic or typical response by victims of sexual offences.
- [17] You must bear in mind that a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. In this matter, it is for you to determine regarding the lateness or belatedness of the complaint and what weight you attach to it. It is also for you to decide, when eventually the complainant did complain, as to the genuineness of the said complaint.
- [18] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [19] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
- [20] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.

- [21] Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [22] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [23] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not guilty of the charges. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [24] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [25] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [26] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [27] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now

are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary facts and the inferences that could be drawn from them.

- [28] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [29] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. It is not his task to prove his innocence.
- [30] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [31] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [32] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [33] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [34] I must also explain to you as to the reason for the use of screen, when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when a screen is placed, the complainant is relieved of any mental pressure to describe the often unpleasant incidents. Please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.
- [35] The same applies for permitting a closed court proceedings when the complainant gave evidence in this case. Again you must not infer that such a protection to the

witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[36] Let us now look at the charges contained in the Amended Information.

[37] There are three charges preferred by DPP, against the accused:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ISIMELI MOCEVAKACA, on the 11th day of November 2015, at Samabula in the Central Division, had carnal knowledge of **LS** without her consent.

SECOND COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ISIMELI MOCEVAKACA, on the 22nd day of January 2016, in Samabula, in the Central Division, unlawfully and indecently assaulted **LS** by kissing her breast and sucking her nipples.

THIRD COUNT

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act 2009.

Particulars of Offence

ISIMELI MOCEVAKACA, on the 9th day of February 2016, in Samabula, in the Central Division, assaulted **LS** thereby causing her actual bodily harm.

[38] As you can see the accused has been charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act); one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act; and one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act.

[39] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[40] Section 207(2) (a) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent;

[41] Therefore, when Section 207(1) is read with Section 207(2) (a) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[42] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[43] Therefore, in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 11 November 2015);
- (iii) At Samabula, in the Central Division;
- (iv) Penetrated the vagina of LS with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

- [44] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.
- [45] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [46] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.
- [47] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.
- [48] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:
- (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.
- [49] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances

known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[50] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 16 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

[51] However, consequent to hearing the testimony of the complainant it is clear that the prosecution has failed to establish the above elements in relation to the count of Rape beyond reasonable doubt. Therefore, the accused cannot be found guilty for the offence of Rape as charged.

[52] However, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 11 November 2015, committed Rape, has satisfied beyond any reasonable doubt that the accused, on 11 November 2015, unlawfully and indecently assaulted the complainant by touching her breasts or any part of the complainant's genitalia; as an alternative, you are then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged in the Information for that offence in the first count.

[53] Section 210 (1) (a) of the Crimes Act reads as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person;

[54] Therefore, in order for the prosecution to prove Sexual Assault in terms of the first count, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 11 November 2015);

(iii) At Samabula, in the Central Division;

(iv) Unlawfully and indecently assaulted LS, the complainant.

[55] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[56] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[57] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of touching the complainant’s breasts or any part of the complainant’s genitalia by the accused, is an indecent act and thereby amounts to Sexual Assault.

[58] As per count 2, the accused is charged with Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act.

[59] As stated before, Section 210 (1) (a) of the Crimes Act reads as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person;

[60] Therefore, in order for the prosecution to prove Sexual Assault in terms of the second count, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 22 January 2016);

(iii) At Samabula, in the Central Division;

(iv) Unlawfully and indecently assaulted LS, the complainant, by kissing her breast and sucking her nipples.

[61] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[62] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[63] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. The prosecution had to establish that the accused unlawfully and indecently assaulted the complainant by kissing her breast and sucking her nipples.

[64] However, consequent to hearing the testimony of the complainant it is clear that the prosecution has failed to establish the above elements in relation to the count of Sexual Assault beyond reasonable doubt. Therefore, the accused cannot be found guilty for the offence of Sexual Assault as charged in count two.

[65] However, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 22 January 2016, committed Sexual Assault, has satisfied beyond any reasonable doubt that the accused, on 22 January 2016, unlawfully and indecently assaulted the complainant by touching her breasts; as an alternative, you are then allowed to look at the lesser offence of Indecent Assault, in terms of Section 212 of the Crimes Act, though the accused is not formally charged in the Information for that offence in the second count.

[66] The elements of Sexual Assault and Indecent Assault are almost identical. However, Indecent Assault is considered as a lesser offence.

[67] The offence of Indecent Assault has been described in Section 212 of the Crimes Act in the following terms:

212. — (1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.

(2) It is no defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency.

(3) It shall be a sufficient defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that —

(a) the boy or girl consented to the act of indecency and that the person so charged had reasonable cause to believe, and did in fact believe, that the boy or girl was of or above the age of 16 years; or

(b) that the offender was of a similar age to the boy or girl and that consent to the act of indecency was given in the context of a continuing friendship between the offender and the boy or girl.

(4) No person who is on a relationship of control or trust over the boy or girl may rely on a defence provided for in sub-section (3).

[68] Therefore, in order for the prosecution to prove Indecent Assault in respect of the second count, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 22 January 2016);

- (iii) At Samabula, in the Central Division;
- (iv) Unlawfully and indecently assaulted LS, the complainant, by touching her breasts.

[69] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[70] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[71] The accused would be guilty of Indecent Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for you as Assessors to consider and decide whether the act of touching the complainant’s breasts by the accused is an indecent act and thereby amounts to Indecent Assault.

[72] As per count 3, the accused is charged with Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act.

[73] In terms of Section 275 of the Crimes Act “A person commits a summary offence if he or she commits an assault occasioning actual bodily harm.”

[74] In order to prove the offence of Assault Causing Actual Bodily Harm, the prosecution must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 9 February 2016);
- (iii) at Samabula, in the Central Division;
- (iv) assaulted the complainant, LS; and
- (v) thereby caused actual bodily harm to the complainant, LS.

[75] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[76] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

- [77] The fourth element relates to the actual assault. The prosecution should prove beyond any reasonable doubt that the accused assaulted the complainant.
- [78] With regard to the final element, the prosecution should prove beyond any reasonable doubt that actual bodily harm was caused to the complainant, as a result of the assault.
- [79] The term ‘harm’ has been defined at Section 4(1) of the Crimes Act to mean: *“any bodily hurt, disease or disorder (including harm to a person’s mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).”*
- [80] However, if you find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 9 February 2016, committed Assault Causing Actual Bodily Harm, has satisfied beyond any reasonable doubt that the accused, on 9 February 2016, unlawfully assaulted the complainant; as an alternative, you are then allowed to look at the lesser offence of Common Assault, in terms of Section 274 of the Crimes Act, though the accused is not formally charged in the Information for that offence in the third count.
- [81] In terms of Section 274 of the Crimes Act “A person commits a summary offence if he or she unlawfully assaults another person.”
- [82] In order to prove the offence of Common Assault, the prosecution must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 9 February 2016);
 - (iii) at Samabula, in the Central Division;
 - (iv) unlawfully assaulted the complainant, LS.
- [83] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [84] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [85] The fourth element relates to the actual assault. The prosecution should prove beyond any reasonable doubt that the accused unlawfully assaulted the complainant.

[86] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Sexual Assault and Indecent Assault are obviously considered as Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[87] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[88] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “Admitted Facts” without placing necessary evidence to prove them:

- 1) It is admitted that in the year 2015 and 2016, the victim LS was residing with the Accused ISIMELI MOCEVAKACA.
- 2) It is admitted that the Accused, ISIMELI MOCEVAKACA, and the victim LS are uncle and niece.
- 3) It is admitted that on the 9th day of February 2016, the Accused ISIMELI MOCEVAKACA hit LS.
- 4) It is admitted that the victim was medically examined by Doctor Guevara on 11th February 2016.

[89] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[90] The prosecution, in support of their case, called the complainant, LS.

[91] Evidence of the complainant LS

- (i) *The complainant said her date of birth was 12 April 1999. So she is currently 19 years old. She will be turning 20 on the 12 of this month.*
- (ii) *The complainant testified that on 11 November 2015, she was residing with Isimeli. Isimeli is her uncle and she is his niece. At the time she was residing with Isimeli at his residence at Namadai Settlement in Samabula.*

- (iii) *She testified that on 11 November 2015, which was during Diwali in 2015, she and Isimeli had gone for a funeral in Muanikau in the morning. During the time they were at Muanikau, she had asked Isimeli to return home since she was suffering from a stomach ache. However, he refused to let her go. He had told her that they should all return home together in the night.*
- (iv) *Accordingly, she and Isimeli had returned home in the night. At the time they arrived home, her stomach was really paining. She then asked Isimeli if she can go to her relatives, who were living on the other side. He had refused. So she laid down inside the bedroom.*
- (v) *The witness testified that in the night, when she had fallen off to sleep, Isimeli had started to molest her. When asked as to what she meant by 'molest', she said "He touched me. My whole body". The witness demonstrated as to how Isimeli had touched her.*
- (vi) *The complainant said that she was lying down on her bed at the time, and that Isimeli was lying down close to her at the time he was molesting her. She had looked up and seen Isimeli inside the room.*
- (vii) *When asked as to what Isimeli was doing, the witness said he tried to take off my clothes. "Then I told him don't, otherwise I will report him." Isimeli had then closed the door and gone outside. She had laid down and gone off to sleep.*
- (viii) *The witness was asked as to whether Isimeli did anything else to her on 11 November 2015, and she said "No".*
- (ix) *The witness testified to an incident which took place in the night of 22 January 2016. At the time, she was still residing with Isimeli at his residence at Namadai Settlement in Samabula. She had been at home in her bedroom. Isimeli's daughter Sulueti had also been at home, and she was sleeping in the living room.*
- (x) *The witness said that Isimeli started to molest her while she was lying on her bed. He had sat on the bed and tried to take off her clothes. She had told him not to do it. "He asked me to but I did not allow him to touch me." She stated that Isimeli had kissed her on her mouth and cheeks. She had tried to push him away but he held her tightly. Isimeli had then taken off her bra and touched her breast with his hands.*
- (xi) *The witness was asked as to whether Isimeli did anything else to her on that particular night, and she said "No".*
- (xii) *Thereafter, the witness testified to the incident which took place on 9 February 2016. Even at that time, she was residing at Namadai Settlement in Samabula.*

- (xiii) *On that day there had been a funeral at the Settlement. Since their house was crowded with people, she had gone and slept the night at her friend's place. She named the friend as Leba'.*
- (xiv) *In the morning, she heard that Isimeli had been asking for her. When she arrived home, Isimeli had scolded her and asked the reason why she had gone and slept at her friend's house. The witness had responded by saying because the house was crowded. Isimeli had then taken off his belt and hit her on her back. The witness demonstrated in Court by pointing to the upper and lower portion of her back.*
- (xv) *When asked as to how many times Isimeli hit her with the belt, she said she couldn't remember. When asked as to whether Isimeli hit her on any other part of her body, she again said she doesn't remember.*
- (xvi) *The witness testified that she was medically examined on 11 February 2016 (this is an admitted fact as well). She said that her aunty Aralai had taken her to the Doctor. Further, the witness said that her aunty Aralai had seen Isimeli hitting her with the belt.*
- (xvii) *The complainant identified Isimeli as the accused in the dock.*
- (xviii) *At this stage of the proceedings, the Learned State Counsel gave the witness her Police Statement (made by her on 11 February 2016) to read for the purpose of refreshing her memory. After reading her Police Statement, the witness confirmed and admitted that all that was written in the statement was told by her to the Police.*
- (xix) *In relation to the incident, which happened on 11 November 2015, the witness said "At the time I was sleeping alone in the room, that was in the middle of the night. I felt that someone was lying on top of me and the clothes were taken off and my clothes were also taken off."*
- (xx) *The witness used the phrases "He (the accused) had molested me", "we slept together", "we stayed together", "he tried to do me" and "he tried to have sex". However, she never explained as to what exactly she meant by these phrases.*
- (xxi) *The witness was asked, "When you say molest, how did he molest you?" She said "He touched my breast and kissed me." Later she said "He touched me. He touched my breast and my private part. When he was doing it to me then I told him not to do it or I will report him."*
- (xxii) *When the witness was asked:*
- Q. *You said he tried to have sex with you. Did he manage to have sex with you that day?*
- A. *No.*

(xxiii) *Several suggestions were put to the complainant by the defence counsel in cross examination.*

(xxiv) *The following further questions and suggestions were also put to the complainant in cross examination:*

Q. *Isimeli tells me that you both were in Muanikau on 10 November 2015 for the funeral (not the 11th)?*

A. *All I know it was the 11th.*

Q. *On 10 November 2015, you with Isimeli all went home and that's when you went to your grand-father's house to tell your grand-father about the stomach ache?*

A. *On the 11th – the night of Diwali?*

Q. *And later on 10 November 2015, Isimeli with your aunty Amelia and Leba took you to CWM Hospital?*

A. *On the 11th day. On the night of Diwali.*

Q. *On 10 November 2015, when they took you to CWM Hospital, you were admitted to CWM Hospital?*

A. *Yes, on the 11 November 2015.*

.....

Q. *I suggest to you that my client on 11 November 2015, did not touch your breasts?*

A. *No, he touched me.*

Q. *I suggest to you that on 11 November 2015, Isimeli did not molest you?*

A. *No, he molested me.*

Q. *I suggest to you that on 22 January 2016, Isimeli did not touch your breasts?*

A. *He touched my breasts.*

Q. *I suggest to you that on 22 January 2016, Isimeli did not kiss your cheeks and mouth?*

A. *No, he kissed me.*

.....

Q. *I suggest to you that you only raised the allegations of the incidents of 11 November 2015 and 22 January 2016, only after your uncle had hit you?*

A. *Yes*

Q. *I suggest to you that you made up these allegations of 11 November 2015 and 22 January 2016, after your uncle had hit you?*

A. *No*

[92] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[93] In this case, the accused opted to remain silent. However, he called his son Mosese Koroi to testify on his behalf. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Case for the Defence

[94] Evidence of Mosese Koroi

- (i) *He is a son of the accused, Isimeli. He is 27 years of age and studying at the Australian Pacific Technical College (APTC). He is following a course in Mechanical Engineering.*
- (ii) *The witness testified that on 9 February 2016, he was staying with his father at Namadi Heights, in Samabula. At the time, it was just him, his younger brother, named Luke Ravula, his younger sister, Sulueti Ledua, his aunt, Titilia and the complainant, LS who were staying at the accused's house.*
- (iii) *He testified to the incident which took place on 9 February 2016. He said I didn't see anything because it was early in the morning. I was sleeping. When I woke up, my dad was holding a belt and he was talking to LS to take a bath and get ready for school.*
- (iv) *When asked as to why his father was holding a belt that morning, the witness said they were told to sleep early in the evening. My sister went to bed early but LS on that night she was missing.*

(v) *He testified that his aunty Aralai was not in their house on the morning of 9 February 2016.*

Analysis

- [95] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, LS, to prove its case. The accused called his son, Mosese Koroi, to testify on his behalf.
- [96] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [97] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [98] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt.
- [99] The accused is totally denying that the incident he is charged for in counts one and two ever took place.
- [100] It has been suggested by the defence that the complainant did not report the incident which took place on 11 November 2015 and 22 January 2016, to anyone (her relatives, her friend Leba or her school teacher) until she made a statement to Police on 11 February 2016. The complainant has not provided any explanation as to the delay in reporting the matter except to say that she was new to her school and not in a position to complain to her teacher.
- [101] As you are aware, the first count against the accused was a charge of Rape, while the second count was a charge of Sexual Assault. However, the complainant did not provide any evidence to substantiate those charges. As a result, I have directed you to consider alternative or lesser charges in respect of the said two counts.
- [102] In cross examination, the complainant said that she was admitted at the CWM Hospital on the night of 11 November 2015. The alleged incident referred to in count one is said to have taken place on the night of 11 November 2015. No explanation has been provided by the Prosecution to clarify this position.
- [103] In her testimony in Court, the complainant said that after the incident of 11 November 2015 took place she had remained in her room and gone off to sleep. However, in her Police Statement it is recorded that she had gone to her friend Leba's house and spent the night there. When confronted by the Defence with this inconsistency, the complainant had said that what she had told in the Police Statement is correct.

[104] I have explained to you how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.

[105] It is for you as judges of fact to consider the totality of the evidence and come to a finding on all of the above matters.

[106] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witness, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the three offences, beyond any reasonable doubt.

[107] You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the other count as well.

[108] In summary, and before I conclude my summing up let me repeat some important points in following form:

- i. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges;*
- ii. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges have been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[109] Any re directions the parties may request?

[110] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charges against the accused. When you have reached your

individual opinions you will come back to Court, and you will be asked to state your opinions.

[111] Your possible opinions should be as follows:

Count One

Sexual Assault- Guilty or Not Guilty

Count Two

Indecent Assault- Guilty or Not Guilty

Count Three

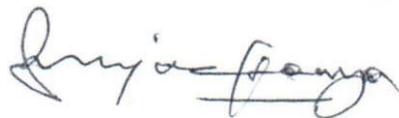
Assault Causing Actual Bodily Harm - Guilty or Not Guilty

If not guilty,

In the alternative

Common Assault- Guilty or Not Guilty

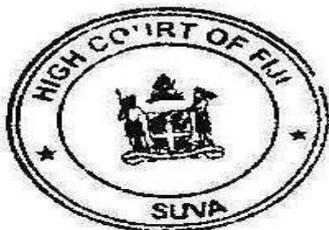
[112] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA

Dated this 4th Day of April 2019

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Office of the Legal Aid Commission, Suva.**